

February 9, 2014

David P. Bonaccorsi, Esq.
Bernard, Balgley & Bonaccorsi, LLP
3900 NewPark Mall Road, Third Floor
Newark, CA 94560

Re: Your Request for Informal Assistance
Our File No. I-14-198

Dear Mr. Bonaccorsi:

This letter responds to your request for advice regarding Section 84308 of the Political Reform Act (the “Act”).¹ Because you are not asking about a specific pending decision, we are treating your request as one for informal assistance. Please note that informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Moreover, the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) This letter is based solely on the facts presented.

QUESTION

May you, as a Fremont Planning Commissioner, participate in applications submitted by a close corporation, if you have received contributions from various individuals associated with the corporation in the 12 months prior to the decision that if subject to aggregation would exceed \$250?

CONCLUSION

You will be prohibited from participating in the decisions if you receive more than \$250 from the applicant corporation and all other sources of contributions whose contributions must be aggregated with those of the corporation. If you have not received more than \$250 from the

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

applicant after aggregation, you may participate in the proceeding. Generally, contributions will not be aggregated when persons act completely independently of each other in making their contributions.

FACTS

You are currently a Fremont Planning Commissioner. You recently campaigned for and accepted contributions in connection with an unsuccessfully bid for a Fremont City Council seat. You ask about the effect of these contributions on performing your duties as a Planning Commissioner.

You stated that you have received contributions from the officers/employees of a closed corporation that may appear as a party before the planning commission. You have not received any contributions from the closed corporation itself. The contributors were:

1. The majority shareholder (hereafter MS) who gave \$249.
2. The majority shareholder's husband (MS-sp) who gave \$249. MS-sp (who may or may not own any shares in the company) is an officer of the Company. You also asked whether it would change the analysis if MS-sp, as an officer, signed the application as an officer of the company.
3. The CFO of the company gave \$249.
4. A second shareholder (SS) gave \$249.
5. The spouse of the second shareholder (SS-sp) contributed in excess of \$250 but is not a shareholder, officer, or employee of the party.
6. An employee of the corporation (EE) made a \$50 contribution. However, the employee will take no part in representing the party in the proceeding.
7. Another shareholder and officer of the corporation has been lobbying other members of the Planning Commission in the matter, however, that individual did not make a contribution to your campaign for City Council.

ANALYSIS

Section 84308 was enacted in 1982 to assure that appointed members of boards or commissions were not influenced by the receipt of campaign contributions from persons appearing before them, and that these officials could not use their position of authority to unduly influence applicants to make contributions to their campaigns. Section 84308 applies to city Planning Commissioners and provides three specific restrictions pertinent to your question.

1. A party seeking a license, permit, or other entitlement for use may not contribute more than \$250 to an officer of the agency.
2. An officer of agency may not solicit a contribution of more than \$250 from a party to a proceeding.
3. An officer of agency may not participate in a decision on a license, permit, or other entitlement for use if officer has received a contribution of more than \$250 from a party (or an agent of a party).²

You have asked about a close corporation that is a party to a proceeding before the Planning Commission and whether contributions by various individuals associated with the corporation will trigger the provisions of Section 84308. Pertinent to this inquiry are the following aggregation provisions of Section 84308 and Regulation 18438.5.

1. **Agents:** A person is the “agent” of a party to, or a participant in, a proceeding involving a license, permit, or other entitlement for use if the person represents the party, or participant, in connection with the proceeding. (Regulation 18438.3(a).) Under Section 84308(b), and Regulation 18438.3, contributions made by a party and the party’s agent are aggregated.
2. **Parent, Subsidiary, or Otherwise Related Business Entity:** Regulation 18438.5(a) provides: “[T]o determine whether a contribution of more than \$250 has been made by any party to a proceeding, contributions made by a party’s parent, subsidiary, or otherwise related business entity... shall be aggregated and treated as if received from the party for purposes of the limitations and disclosure provisions of Section 84308.

“A parent/subsidiary relationship exists when one corporation has more than 50 percent of the voting power of another corporation. Business entities are “otherwise related” if any of the following three tests is met:

“(A) One business entity has a controlling ownership interest in the other business entity;

“(B) There is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors: (i) The same person or substantially the same person owns and manages the two

² A “party” is “any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use.” (Section 84308(a)(1).) A “participant” is “any person who is not a party who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision . . .” (Section 84308(a)(2).) A person “actively supports or opposes a particular decision” if the person “lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency.” (Id.)

entities; (ii) There are common or commingled funds or assets; (iii) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis; (iv) There is otherwise a regular and close working relationship between the entities; or

“(C) A controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity.”

3. **Closed Corporations:** Section 84308(d) states that when a “closed corporation is a party to, or a participant in, a proceeding involving a license, permit, or other entitlement for use pending before an agency, the majority shareholder is subject to the disclosure and prohibition requirements specified in subdivisions (b), (c), and (d).”
4. **General Aggregation Rules:** in some cases the contributions of an entity are aggregated. For example, the contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual. Similarly, if two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities shall be aggregated. Finally, contributions made by entities that are majority owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person, unless those entities act independently in their decision to make contributions. This provision would not apply to your facts since the closed corporation has not made a contribution.
5. **Spouses:** Generally, a husband and wife’s contributions are not aggregated for purposes of disqualification under Section 84308. (See also, Section 85308(a).)

Applying the provisions above to your situation, it would appear the following contributions would be aggregated for purposes of Section 84308:

- The contribution of MS (\$249) would be aggregated with the contributions of the corporation (\$0).
- Additionally, if, hypothetically, MS-sp signed the application as an agent of the corporation, his contribution would also be aggregated (\$249) with those of MS and the corporation making the total contribution over Section 84308’s threshold. Otherwise, MS-sp’s contribution would not be aggregated merely based on the spousal relationship.³

³ If an officer receives a contribution that would otherwise require the officer’s disqualification, the officer may return the contribution within 30 days from the time he or she knows or should have known about the contribution and the proceeding, and then is permitted to participate. (Section 84308(c).)

In this scenario, none of the other contributor's contributions would be aggregated for purposes of the corporation's application. This assumes, of course, the contributions are independent contributions and not ones that are actually directed and controlled by any one person.

As noted above, informal assistance does not provide the immunity that formal written advice provides. This is because formal advice is necessarily dependent on the specific facts concerning a specific decision. Consequently, when the corporation does file an application, you may want to seek additional formal advice.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl